**U.S. Department of Labor**

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**Issue Date: 07 March 2005**

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In the Matter of

CASPER A. KNIGHT
Claimant
v.
ATLANTIC MARINE, INC.
Employer
And
SOMERSET INSURANCE SERVICES OF TEXAS
Carrier
And
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest
……..

Case No. 2002 LHC 00219
OWCP No. 6-166878

ORDER AWARDING ATTORNEYS FEES

Six Applications for Approval of fees and costs totaling $355,193.12 have been filed in this matter: one for Robert Johnson, Esq., totaling $205,946.61, consisting of 661.05 hours and billed at a rate of $300.00 per hour and $7,631.61; and one for Michael McHale, Esq., totaling $77,948.16, consisting of hour 257.3 at a rate of $300.00 per hour and costs amounting to $758.16. Mr. McHale subsequently requested an additional $15,325.00 in fees and $10.00 in costs. In addition, Thomas Farrell, Esq., submits an Application for Fees totaling $29,430.00, representing 138.85 hours and costs amounting to $3,215.97. Finally, Claimant, himself, has filed two applications for costs totaling $23,317.38, of which $8,360.39 were allegedly incurred while the matter was pending before the District Director.

The Employer variously objects to the hourly rates billed, many of the costs incurred, and the number of hours expended. Asserting that Claimant achieved only limited success in pursuing his claim for an award of permanent total

disability, Employer contends that the fees requested are grossly disproportionate to the degree of success obtained, reflect an absence of "billing judgment" and should be set aside in their entirety. It argues further that Claimant was awarded temporary total disability as advocated by the Employer, and that medical management issues were resolved in its favor. It disputes the need for two attorneys to represent Claimant. It challenges, as excessive, the number of conferences counsel conducted with Claimant. It objects to communications with an attorney representing a physician seeking fees. It questions conferences with Claimant's former counsel as irrelevant, and objects to travel time and expenses, and copying costs. The Employer also objects to many of the costs incurred by Claimant, himself, including, among other items, copying expenses totaling $9,213.08, the purchase of a fax machine, and costs for investigative reports he obtained on three individuals, including two physicians selected by the Employer to examine him. The Employer's objections are considered below.

Before addressing the fees and costs billed for services rendered and costs incurred while this matter was pending before me, we need dispose of those portions of these petitions which involve services rendered before other decisionmakers.

Mr. Farrell's Petition

As previously noted, the total amount of the fees and costs claimed in this matter exceed $355,000. Thomas Farrell, Esq., submits an Application for Fees totaling $29,430.00, representing 138.85 hours and costs amounting to $3,215.97. The services Mr. Farrell provided, however, were rendered before Judge Teitler when this matter was before him in 2001. The Board has held that fees for services are appropriately addressed by the tribunal before which the services were rendered; and in this instance, I have previously advised counsel that his petition should be addressed to Judge Teitler. Now that a final award has been entered, it would appear that Mr. Farrell's Petition is ripe for consideration. It should, however, be filed with Judge Teitler, and must here be denied.

Costs Incurred By Claimant before the District Director

In addition, Claimant has filed an application for costs totaling $23,317.38, of which $8,360.39 were allegedly incurred while the matter was pending before the District Director. Claimant must request the District Director's approval of these costs. Therefore, $8,360.39 in costs claimed by Claimant for expenses incurred before the District Director will not further be considered here and must

be denied. Accordingly, of the $355,193.12 in pending fees and costs claimed, $41,006.36, must be denied, and claims for the remaining $314,186.76 are addressed below.

Hourly Rate Billed by Messrs. Johnson and McHale

In assessing the appropriate hourly rate in a contested fee situation, a number of factors need be considered, including the prevailing fees in the geographic market in which the services were rendered, the level of expertise exhibited by counsel, the efficiency demonstrated in dealing with the issues, and the overall complexity of the matter. 20 C.F.R. Section 702.132. In this instance, the Jacksonville, Florida area is the relevant geographic market in which to evaluate the hourly rate of $300.00 claimed by both Mr. Johnson and Mr. McHale.

Counsel contends that $300.00 per hour is the "appropriate billing rate" they charge to represent clients, and Mr. Johnson emphasizes that he has received approval of that amount in the past. Mr. Johnson's credentials are beyond dispute in this proceeding. His Petition demonstrates that he is a very experienced Longshore attorney; however, it does not demonstrate that this matter involved especially complex legal issues.

While neither party has submitted sufficient data to support a finding of a prevailing rate in the relevant market, a number of recent attorney's fees matters in the Jacksonville area indicate that $175.00 per hour is a reasonable fee rate for an experienced attorney in the average case, and $200.00 per hour would not be inappropriate in cases which present some unusual aspects. *See,* King v. Atlantic Drydock, 2002 LHC 1925, 1926 (ALJ, June 28, 2004 ); Sibley v. RCA Services, 2003 LHC 03, (ALJ, October 6, 2004). These cases are relevant here. Edwards v. Todd Shipyard Corp., 25 BRBS 49 (1991), In this instance, the fact circumstances were not without a degree of complexity, and counsel allegedly encountered some difficulties in discovery dealing with the scope of the defense; but no factors are evident which suggests that exceptional expertise was needed or that unique efficiencies were achieved in producing the limited favorable outcome eventually secured. 20 C.F.R §702.132(a).

Although this case involved complex medical issues, the legal issues were relatively straightforward. Under such circumstances, while the employer believes that $150.00 per hour should suffice, I conclude that a fee rate of $200.00 per hour is appropriate for Mr. Johnson's work in this case, and, in view of the foregoing

considerations, it will be approved. *See,* King*, supra* Sibley, *supra;* and Edwards, *supra.*

Turning to Mr. McHale's Petition, it demonstrates that he is indeed an expert in the field of Admiralty and Maritime law with impressive credentials and many transferable skills which will serve his clients well in the field of Longshore litigation. Yet, expertise in an area of law usually entails not only talent but a combination of skill and actual experience in the trenches grappling, over time, with the nuances of the issues each field of practice uniquely presents. In view of the fact that counsel's petition does not demonstrate special expertise in the specific field of Longshore practice, justification of a $300.00 per hour rate for his participation in a Longshore adjudication has not been demonstrated. 20 C.F.R §702.132(a).

As noted above, experienced Longshore counsel in Jacksonville command $175.00 to $200.00 per hour. In this instance, the Employer asserts that Mr. McHale's services were not needed and, therefore, it may not be held responsible for his fees. Alternatively, Employer contends, if it is found responsible, Mr. McHale's fee rate should not exceed $135.00 per hour, because he served in the capacity of an associate to Mr. Johnson, having examined only one witness throughout discovery and at the hearing.

Need for Co-Counsel

Addressing first, Mr. Johnson's need for co-counsel, I turn initially to the structure and composition of the litigation team the employer assembled in preparing its defense. Two attorneys appeared on behalf of the employer, and both participated during the discovery period and at the hearing. Of course, the manpower the Employer deemed necessary would not automatically dictate the needs of a party opponent, but it does tend to suggest that the scope of the defense issues the Employer intended to litigate was not a one person operation.

What the investment in manpower for the defense merely suggests, the discovery process and the subsequent hearing confirm. The Employer, prior to the hearing controverted, as it is clearly entitled to do, virtually every issue related to the claim, issued in excess of 45 subpoenas, and conducted extensive discovery. The hearing itself lasted several days. While I am not unmindful of the Employer's legitimate concern that it not be billed for duplicative or unnecessary serves, I find the circumstances of this case justified Mr. Johnson's decision to

seek the assistance of co-counsel as a legitimate and necessary measure to present Claimant's case adequately and prepare his response to the Employer's defenses.

Co-Counsel' Hourly Rate

Atlantic Marine emphasizes, however, that Mr. McHale served in a supportive capacity and should not be compensated at the same hourly rate as Mr. Johnson. I concur that Mr. McHale's hourly rate must be reduced but not solely for the reasons advanced by the Employer. Because Mr. McHale lacks the in-depth experience in the field of Longshore adjudication that Mr. Johnson brings to the table, his expertise does not command the same hourly rate. Indeed, unlike Sibley, *supra,* his application here does not indicate that he possessed any Longshore experience prior to entering into this matter. Considering all of the foregoing factors, I conclude that, although I have in the past approved a higher rate for Mr. McHale, *See e.g.* Spaziani v. Boh Brothers Constr. Co., 2003 LHC 1720, and Sibley, I conclude that $135.00 per hour is a fair and reasonable rate for Mr. McHale considering the level of his experience and his involvement in this matter.

Number of Hours Billed

Before turning to the individual items challenged by the employer, I should comment further on the correlation between the hourly rate an expert may command and the efficiencies he or she may be expected to achieve. In this instance, Mr. Johnson claims in excess of 660 hours while Mr. McHale claims in excess of 257 hours.

In general, an inverse relationship exists between the expertise claimed and the number of hours billed. As the level of expertise increases, the number of hours it should take to prepare a case would be expected to decrease; and conversely, a novice in the field would be expected to require more time than an expert to study and prepare the same case. Thus, inherent in the expert's fee is the skill and knowledge which allows him or her to achieve the type of practice efficiencies which benefit the client or the party otherwise responsible for the client's bills.

In the usual situation in which the client pays the fee, the relationship imposes an important check on the attorney's pricing freedom. A client would not expect, and would likely object, if an expert in the field billed for the same number of hours to complete a project as it would take an inexperienced junior associate.

Yet, in the regulatory environment in which this case arises, the Claimant/client is not the party responsible for paying his attorney's fees. Rather, the opposing party is on the hook, and normal economic fee constraints are absent.

As the normal supply and demand curve demonstrates, as price approaches zero, demand approaches the infinite. To the Claimant in a Longshore case, the price of an attorney's services is zero. He is restrained by none of the economic forces that limit a non-subsidized client's demand for counsel's time. Since Claimant is not paying the fee for services he receives, the potential demand for service can mount considerably, and not all of that demand may be reasonable. If the attorney himself places no restraints on the client's demand for service under these circumstances, or if the attorney abuses the absence of such economic restraints by generating excessive communications, no real constraint, beyond the attorney's inherent endurance, exists at all.

Congress thus solved this dilemma by substituting a third party approval process for the usual market checks and balances which exist between an attorney and client. This alternative mechanism anticipates that essentially the same economic considerations that otherwise exist for a client paying an hourly rate also exist in the regulatory setting in which the service is essentially free to the client and someone else pays the fee. Reasonable consultation and communication is expected and the attorney is entitled to fair compensation for his services, but the party responsible for paying the fee is entitled to the same types of constraints that the market would impose. See also, 20 C.F.R. Section 702.132

This, of course, is not to suggest that the market analogy is perfect. Important differences do exist when the opposing party is called upon to foot his opponent's bills. Thus, for example, Claimant's counsel must prevail to receive his fee, but must at all times provide services reasonably necessary to prepare adequately and present his client's case. In turn, the Employer is entitled to mount the defense it deems in its best interests. When the Employer pulls out all the stops and vigorously defends or requires full discovery on virtually every issue and the claimant still prevails, claimant's counsel need not subsidize his client's case by accepting less than the fees generated by the dictates of his adversary's strategy.

Petitions by Messrs. Johnson and McHale

As discussed above, Messrs. Johnson and McHale petitioned for fees totaling $198,315.00, and $77,190.00, respectively. Mr. McHale subsequently requested and additional $15,325.00 for work performed post-hearing in

connection with Claimant's visit to the Cleveland Clinic. Each billed at a rate of $300.00 per hour which, as discussed above, I found excessive under the circumstances and reduced accordingly to $200.00 per hour for Mr. Johnson and $135.00 per hour for Mr. McHale. In addition, Mr. Johnson billed 45.2 hours for work performed before the District Director, prior to October 26, 2001 when this matter was referred for hearing, and Mr. McHale billed for 21.9 hours of work before the District Director. As previously, noted, hours billed for work performed before the District Director must be submitted to that office for approval, and are herein denied.

Fees Based on Adjusted Hourly Rates

As reduced by the adjustments in their hourly rates and by denial of the hours billed for work before the District Director, the product of the hours billed for work before me times the fee rate approved for Mr. Johnson would result in a fee amounting to $123,170 (661.05-45.2= 615.85 x $200.00) or $75,145 less than the amount he claimed for the 661.05 hours he billed. As reduced, the product of the hours billed times the fee rate approved for McHale would result in a fee amounting to $38,674.80 (257.3+ 51.08 - 21.9= 286.48 x $135.00) or $53,840.20 ($77,190+15,325-$38,674.80) less than the fees requested for the 308.38 hours (257.3+51.08) billed.[1]

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[1] The Employer challenges a number of excesses in these petitions in addition to the hourly rates. The Employer objects to 66.85 hours, entailing 113 specifically identified items in Counsel's petition, expended by Mr. Johnson in an attempt to establish that the whole body spread of CRPS and justification for treatments provided by Drs. Hooshmand, Green, and Fralicker. The Employer's concerns are not without merit. Indeed, the preparations for and depositions of Drs. Green and Hooshmand took only a few hours. Their reports were available. To the extent the physician contacts were related to the successful claim of temporary total disability, shear number of contacts was, nevertheless, excessive.

Similarly, the Employer objects to 74.55 hours, involving hundreds of entries, expended by Mr. Johnson corresponding with and conferencing with Claimant, and 99.3 hours, again involving hundreds of entries, expended by Mr. McHale conferencing and corresponding with Claimant. These client communications are also excessive.

I am mindful that Claimant was a demanding client, but counsel failed to exercise reasonable restraint in satisfying that demand. Claimant conducted medical and legal research on his own, employed private investigators, conducted internet research on his own, and harbored suspicions about nearly everyone with any connection to this matter. Having reviewed many hundreds of fee petitions over the years, however, none, in my experience, match the volume of client contacts reflected in Counsels' filings.

Thus, these petitions provide a classic example of the dynamics of the supply and demand curve at work. As price approaches zero, demand approaches the infinite. The price of these communications was zero to the client. He placed no restraint on his attorneys, and they placed no restraint on his demands. Clearly, Counsel has an obligation to involve the client in the development of the case and keep him adequately informed of the progress and status of the matter; but the extraordinary frequency of these communications, on occasion on a daily basis, and at times twice daily, reflect that neither Counsel nor the client was restrained by the economic forces that limit client

Reasonableness of Adjusted Fees

Although the reductions based solely upon the adjustments in counsels' hourly rates are substantial, the reasonableness of the amount of the fees which remain is still in question. Considering the totality of circumstances involved in this case, including the complexity of the medical issues, Claimant's age and the possible duration of benefits, and the vigor of the defense in light of the success achieved, I find and conclude that the petitions filed in this matter, even as reduced, remain excessive.

I am mindful that further reductions may seem harsh, and I do not impose them lightly. Claimants are entitled to vigorous prosecution of their claims, and I am inclined to take no action which would discourage any attorney from taking all reasonable measures to ensure their client's success. The circumstances here, however, pose little risk of deterring vigorous Claimant advocacy. Having adjudicated Longshore claims for 25 years, these petitions stand out as unusual both in the number of hours claimed and total fees sought. Moreover, research of claims nationwide, including large metropolitan areas where prevailing fee rates are higher than in Jacksonville, failed to reveal any fee petition filed at anytime which approached magnitude of the fees claimed here. More importantly, the legal issues, fact circumstances of the case, and the success achieved do not reasonably warrant the fees and costs claimed.

Limited Success

It has been held that the amount of benefits awarded, including future benefits, is a valid consideration in awarding a fee. Muscella v. Sun Shipbuilding and Drydock Co., 12 BRBS 272 (1980); White v. Newport News Shipbuilding & Drydock Co., 633 F.2d 1070 (4th Cir. 1980); 4 BRBS 279; Roach v. General Dynamics Corp., 15 BRBS 448 (1984). In this instance, the benefits were awarded and the work counsel performed to secure the award was considerable; however, substantial claims were raised in this proceeding which Claimant failed to secure. Under these circumstances, and considering the magnitude of the fees demanded in this proceeding in light of the level of success achieved, the principles articulated by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983) seem applicable. Ingalls Shipbuilding, Inc., v. Director, 46 F.3d 66 (5th Cir. 1995);

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demands and attorney billing freedom. The excessive number of hours billed will be taken into consideration, in the context of applying the Hensley criteria, *infra.*

George Hyman Constr. Co. v. Brooks, 963 F.2d 1532 (D.C. Cir. 1992); General Dynamics Corp. v. Horrigan, 848 F.2d 321 (1st Cir. 1988); Rogers v. Ingalls shipbuilding, Inc., 28 BRBS 89 (1993)

## Hensley Factors

In Hensley, the successful attorneys in a civil rights case sought fees amounting to approximately $150,000 and enhancements of 30 to 50 percent, for a total award of somewhere between $195,000 and $225,000. The high court observed that the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate is the most useful starting point for determining the amount of a reasonable fee, but the product of hours times rate does not end the inquiry. As such, under circumstances in which a Claimant achieves limited success, the Court's decision poses two questions which must be addressed: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" Hensley at 435. Providing further guidance, the Court ruled that when claims are related or involve a common core of facts, making it difficult to divide the hours expended on a claim-by-claim basis, the trier of fact "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Hensley at 436.

For the Claimant who has achieved partial or limited success, Hensley cautions that the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. The Court observed that: "This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith…. The most critical factor is the degree of success obtained." Hensley at 437. The question is how to apply the Hensley principles in a fair and equitable way; and to a large extent, the Court turned to the sound discretion of the trier of fact: "There is no precise rule or formula for making these determinations," the Court observed, emphasizing that: "… the district court has discretion in determining the amount of a fee award.... When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." Hensley at 437-38.

To further illustrate the clarity it seeks, the Supreme Court reversed the award entered by lower court in Hensley:

> "…because the District Court's opinion did not properly consider the relationship between the extent of success and the amount of the fee award. The court's finding that 'the [significant] extent of the relief clearly justifies the award of a reasonable attorney's fee' does not answer the question of what is 'reasonable' in light of that level of success. We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Hensley at 439-40. (footnotes omitted).

Applying Hensley

Now the initial issue is not whether the trier of fact found in Claimant's favor on each of several related claims. The first Hensley question is whether the Claimant failed "to prevail on claims that were unrelated to the claims on which he succeeded." The answer here is "no," Claimant did not fail to prevail on claims that were unrelated to the claims on which he succeeded. He claimed permanent total disability and received an award for temporary total. He sought extensive medical benefits for care and treatment of whole body CRPS and received an award based upon the condition of his left lower extremity. His claims involved the nature and extent of disability and reasonable and necessary medical care for his condition. The claims he prevailed on and the claims he lost are clearly related. Under these circumstances, the Court was clear that when a matter consists of related claims, a Claimant who wins substantial relief should not have his attorney's fee reduced simply because each contention raised was not adopted. Counsel has thus overcome the hurdle of the first Hensley question.

Where the Claimant achieves only limited success, however, the fee award should only include the amount of fees that are reasonable in relation to the results obtained. Thus, the second Hensley question is whether the Claimant achieved "a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" Hensley at 435.

In this proceeding, Claimant was awarded substantial relief, but it was, nevertheless, limited "in comparison to the scope of the litigation as a whole." Hensley at 439-40. Claimant sought and received compensation for a brief period in 1995 and the period Employer suspended benefits from September 20, 2001 to

January 4, 2002, and he received coverage for other benefits owed but not paid by the Employer. Counsel estimates that past due benefits they secured totaled approximately $200,000.

Yet Claimant sought benefits for permanent total disability, but was awarded instead temporary total disability benefits. Accordingly, his entitlement to future compensation, a factor the Board raised as pertinent, is temporary and will depend on a number of issues that he failed to establish in this proceeding. Consequently, while the amount of each installment of compensation he receives for temporary total disability (based upon 66 2/3% of his average weekly wage of $520.00) is the same as the installment he would receive for permanent total disability, the number of such future installments may be vastly different, and may decrease in amount if the temporary total disability were to resolve into permanent partial disability. Since Claimant is a relatively young man, his failure to establish entitlement to the permanent total disability claimed represents a significant limitation in the relief achieved in "comparison with the litigation as a whole."

Similarly, Claimant was awarded substantial medical benefits; however, his failure to establish, as claimed, that his RSD or CRPS migrated to areas of his body beyond his left lower extremity resulted in award which was less than total body care and treatment, along with home care attendants, and various medical devises Claimant received in the past and sought for the future. Under these circumstances, I conclude that the relationship between the amount of the fees sought is, to a significant degree, disproportionate to the results obtained. *See* Hensley at 437-38. Accordingly, even though the claims were interrelated, non-frivolous, and raised in good faith, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate is, in this instance, an excessive amount. As the Court decreed, "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Hensley at 439-40. The victory achieved here simply does not support the amount of the fees claimed. Hensley at 437.

A Reasonable Fee for Limited Success

Still, as noted above, Counsel obtained substantial relief in a case that was quite vigorously defended. The question, then, is how to compensate them in a fair and equitable way. Again, we turn to Hensley. "There is," the Court observed, "no precise rule or formula for making these determinations," but the Court emphasized that: "… the district court has discretion in determining the amount of a fee award...," but "should make clear that it has considered the relationship

between the amount of the fee awarded and the results obtained." Hensley at 437-38. With some latitude afforded by the ability to exercise due discretion in the matter, we turn to the final, and most difficult Hensley inquiry: "the question of what is 'reasonable' in light of the level of success." Hensley at 440.

Now the Employer argues that Claimant received an award of temporary total disability as advocated by the Employer. This characterization of Employer's position is not entirely accurate. As the Employer well knows, it conceded nothing up until the day of the hearing, which, of course, forced Claimant to prepare virtually every element of his case for trial. Since Claimant's counsel developed and prevailed on the issue of temporary total disability, they will not now be expected to, in effect, subsidize the Employer's defense to their successful claims with a fee award that in any way penalizes a reasonable response to the Employer's litigation strategy. The fees approved here, accordingly, take into consideration the demands imposed by the vigor and scope of the Employer's pre-trial and global defense tactics to the claim of temporary total disability and medical care for the job-related injury.

As noted above, the Employer challenged as reasonably necessary hundreds of itemized hours in Counsel's petition, and I have found that many of the items are excessive. S*ee* fn. 1, *supra.* Yet, a Hensley analysis does not require the trier of fact to ruminate over each of the hundreds of specific entries in Counsels' voluminous petitions, isolating and evaluating specific instances of excess. In Ezell v. Direct Labor, Inc., 33 BRBS 19 (1999), the Administrative Law Judge did not specify, beyond five, which of counsel's entries were excessive, and the Board affirmed a 90% reduction in the fees requested. Similarly, in Hill v. Avondale Industries, Inc., 32 BRBS 186 (1998), aff'd sub nom. Hill v. Director, OWCP, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), cert. denied, 120 S.Ct. 2215 (2000), the Board held that the Administrative Law Judge properly imposed a 75% reduction in the fees requested based on claimant's partial success in obtaining medical benefits. Thus, the question remains here whether Counsels' fees, after the reduction in the excessive hourly rates, totaling $123,170 for Mr. Johnson and $38,674.80 Mr. McHale are reasonable in light of the limited success achieved in comparison with "the scope of the litigation as a whole." Hensley at 439-40. I conclude that they are still excessive.

Considering the award of temporary total disability in comparison with the claim for permanent total disability sought and the partial success in obtaining the medical benefits claimed, I conclude that a fee in the amount of $35,000.00 for Mr. Johnson and $20,000 for Mr. McHale represents fair and equitable compensation.

The percentage reductions from the adjusted hourly rate fee is substantially less than the adjustments in Ezell and Hill, and while the remaining fees may seem a bit high to some and low to others, I find them reasonable considering not only the limited success achieved, but in light of the scope and vigor of the defense interposed by the Employer against any recovery by Claimant.

## Costs

### Costs Incurred by Mr. Johnson

Counsel seeks recovery of costs described as reasonable and necessary totaling $7,631.61. The Employer objects to $358.21 in postage and $319.50 in copy expenses as unrecoverable overhead; and alternatively as too vague or excessive. Employer notes that Counsel billed thirty cents per page for use of his in house copy machine and believes that amount should, in the event copying is not overhead, be reduced to a nickel a page. In addition, Employer objects to counsel's travel time and expenses from his offices in West Palm Beach to Jacksonville on the ground that experienced attorneys who specialize in Longshore cases are available in Jacksonville. Costs for such items as transcript and witness fees are not contested and are approved.

### Travel Time and Expense

The Employer objects to Counsel's claim for travel and expenses from his offices in West Palm Beach, Florida to Jacksonville, Florida; Claimant's hometown and the venue of this case. Employer observes that the Jacksonville area is home to many competent Longshore attorneys, and accordingly, the travel for an attorney outside Claimant's area should not be granted unless competent local counsel could not be secured. The Employer is correct in observing the Jacksonville is home to many attorneys who specialize in Longshore litigation and many who represent claimants, employers and carriers; however, that is not the determining factor. The test the BRB applies in considering fees associated with travel asks whether the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. Neeley v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 138 (1986); Ferguson v. Southern States Cooperative, 27 BRBS 16 (1993).

The Board has rejected claims for local travel as overhead while approving claims for more lengthy trips. *Compare*, Neeley, *with* Harrod *v.* Newport News Shipbuilding & Dry Dock Co., 14 BRBS 592 (1981). Moreover, although Neeley

may, in dicta, suggest that the availability of local counsel may be a factor in evaluating "necessity," the Board, in more recent cases, has, for example, affirmed a lawyer's travel time between Atlanta and Savannah, a venue not devoid of skilled Longshore counsel, as reasonable, necessary, and in excess of normal office overhead. O'Kelley v. Dep't of the Army/NAF, 34 BRBS 39 (2000); Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982). Indeed, in Merisier v. Ceres Marine Terminals, BRB No. 98-1597 (Sept. 7, 1999)(published on the Board's website), the Board, citing Neeley, allowed five hours of round-trip travel time between Savannah and Charleston for claimant's attorney. Again, Charleston is not a venue devoid of highly skilled Longshore counsel, but the availability of counsel did not seem to factor into the Board's consideration. To the contrary, the Merisier Board, in affirming travel time and costs, seemed persuaded by the argument that a claimant has a right to choose his attorney, just as the Employer in this case, as I note in passing, secured counsel from New Orleans to represent it despite the availability of highly skilled Longshore defense counsel in Jacksonville.

Thus, the applicable precedents would not seem to permit rejection of the travel costs claimed on the ground that Claimant failed to demonstrate the unavailability of competent local counsel. More pertinent, it seems, is the fact that the distance involved here is sufficient to deem it allowable under Merisier; and, accordingly, it appears necessary, reasonable, and in excess of that normally considered to be a part of office overhead. In accordance with Neeley, O'Kelley, and Merisier, such costs are recoverable, and will be approved. Counsel's travel time as reflected in his fees are already covered in the fee award of fifty thousand dollars approved above.

Postage and Copying Costs

Counsel also seeks $358.21 for postage and $319.50 in copying costs billed at thirty cents per page for Counsel's in-office copy machine. As previously noted much of the correspondence Counsel initiated was excessive, and these costs, in part, reflect that excess. Moreover, aside from the fact that the vast majority of postage charge items fail to disclose what was mailed and to whom, routine postage otherwise represents an unrecoverable overhead cost associated with the operation of a law office. Brown v. Bethlehem Steel Corp., 20 BRBS 26 (1987). Copying costs too may be deemed overhead in some instances, Picinich v. Lockheed Shipbuilding, 23 BRBS 128 (1989); however, in this particular case, the nature of the defense warrants some latitude in evaluating such matters. Accordingly, copying costs will be approved, but at a reduced rate per page. Mr. McHale, as noted below, billed copying charges at a rate of fifteen cents per page.

The Employer did not object to that rate, and it appears reasonable under the circumstances. Accordingly, costs for copying in the amount of $159.75 will be approved.

For all of the foregoing reasons, expenses in the amount of $7,113.65 will be approved for Mr. Johnson.

Mr. McHale's Costs

Finally, Mr. McHale requests costs total $768.16. He bills for, *inter alia*, travel expenses and copying costs, interestingly, at a rate of fifteen cents per page. Travel costs are costs are discussed above, and the Employer has not otherwise specifically objected to Mr. McHale's other expenses. Accordingly, $768.16 in costs will be approved for Mr. McHale.

Claimant's Costs

As previously mentioned, Claimant has personally submitted two petitions for approval of alleged litigation costs, one in the amount of $13,669.29, excluding the costs incurred before the District Director, and a supplemental petition in the amount of $1,287.70. Claimant, who is represented by counsel, has apparently submitted these petitions, *pro se*. Thus, his attorneys have not confirmed that any of the costs he seeks were reasonably necessary to their preparation or their prosecution of his claim, and Claimant is not an attorney who can make those legal judgments on his own. He spent, for example, hundreds of dollars purchasing legal references from Lawyers and Judges Publishing Company, but his attorneys have not indicated that these purchase orders were placed at their request or how they used the material to advance Claimant's cause. Claimant hired Dwyer Surveillance Specialists to engage in surveillance of one individual and prepare reports on two physicians at a cost of $690.00. Yet his attorneys have not indicated that they ordered these investigative services as needed to prepare Claimant's case or that the investigator was engaged at their request. Costs incurred by Claimant to satisfy his curiosity, allay his suspicions, or to pursue other purposes unrelated to his attorneys' case development are not the type of costs that are recoverable in this proceeding.

In addition, Claimant has billed over $9,000.00 in photocopying costs. These costs were allegedly incurred at Auto Trim Design, an automotive specialty shop that is not in the business of providing photocopying or litigation support services. Thus, how Claimant and Auto Design came together to produce

photocopies is not clear on this record, and there is no indication what competitive factors led to the per page pricing structure they adopted. For each job, and these petitions include dozens of bills from Auto Design, the first 25 pages were billed at $1.00 each, the next 75 pages were fifty cents each, and all pages over 101 were twenty-five cents per page.

Aside from the fact that these bills fail to show what was copied, and thus are insufficiently identified to support recovery, there is no indication that these copies were provided at a competitive, commercial rate, negotiated in an arms-length transaction. To the contrary, there are indications that costs may have been run up intentionally. Recalling that the first 100 pages on each job cost the most, the pattern of photocopying shows, for example, that 105 pages were copied on January 24, 2002; on February 6, 81 pages were copied; on February 17, 76 pages were copied; on February 26, 220 pages were copied; two days later, 77 more pages were copied; and a day later another 330 pages were copied. Assuming all copies were needed for Claimant's case, it is unclear why the documents were not run in one batch to minimize the expense. Indeed, Claimants' Counsel have not represented that their case preparation needs justified such sporadic and costly document copying.

Claimant also seeks recovery for transcript costs, telephone calls, office supplies and equipment, stamps, transportation cost and other expenses, but their specific connection to his attorneys' needs is not clear. Indeed, many items are not described with sufficient particularity and others appear to represent duplicate services or costs, such as transcripts, which were billed by Claimant's counsel. A third-party payor is not responsible for vague charges, duplicate billing, excessive charges, or unnecessary expenses.

Again, costs incurred for an activity that was reasonably necessary in Counsels' legal judgment to protect Claimant's legal interests are recoverable. In this instance, Claimant's petitions simply failed to identify which of his itemized costs were associated with his attorneys' specific needs and were reasonably necessary and non-duplicative of costs they incurred and billed in their petitions. Accordingly, Claimant's petitions for costs are inadequate, and must be denied.

## ORDER

IT IS ORDERED that Employer pay to Robert R. Johnson, Esq., the sum of $42,113.65 for costs incurred and services rendered to the Claimant, and;

IT IS FURTHER ORDERED that Employer pay to Michael J. McHale, Esq., the sum of $20,768.16 for costs incurred and services rendered to the Claimant, and;

IT IS FURTHER ORDERED that Petitions for fees and costs filed by Thomas Farrell, Esq., and Claimant, Casper Knight be, and they hereby are, denied.

A

Stuart A. Levin
Administrative Law Judge